

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

IN RE: BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION
(MDL No. 2406)

Master File No. 2:13-CV-20000-RDP

This document relates to the Subscriber Track.

**DEFENDANTS' BRIEF IN SUPPORT OF
SUBSCRIBER PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT**

Defendants, the 36 Blue Cross Blue Shield Plans and the Blue Cross Blue Shield Association, respectfully submit this memorandum in support of preliminary approval of the proposed Subscriber Settlement Agreement.

I. The Subscriber Settlement is Fair, Reasonable, and Adequate.

A. Background

The Subscriber Track actions in this consolidated MDL have been fiercely litigated since their inception almost a decade ago. Subscribers challenge a combination of rules regulating the Blue System, a nationwide network of Blue Plans through which more than 100 million members—individuals and groups across the country—purchase health insurance for themselves and their families. Defendants steadfastly maintain the legality and procompetitive nature of their rules and remain fully prepared to defend the System on the merits.

At the same time, the parties have engaged in vigorous, arms' length negotiations to explore a fair and reasonable settlement that would preserve the many procompetitive benefits that have made Blue Plans leaders in the provision of health insurance for more than 80 years. Without such a resolution, Plaintiffs faced extraordinary complexity, risk, and expense, not only in the Alabama streamlined action, but also in the coordinated cases that would return to their home jurisdictions for subsequent trials nationwide. Plaintiffs would confront difficult issues of class certification, the appropriate standard of review, two-sided markets, antitrust injury, damages, and the single-entity defense—to name only a few—in countless trial and appellate courts for many years to come.

The proposed Settlement before the Court offers reasonable terms that reduce the risks for all parties. For Subscriber Plaintiffs, the Settlement offers a number of changes to the Blue System rules that they challenged. Chief among those changes are the elimination of any national revenue restrictions for Blue Plans' unbranded businesses (Settlement Agreement ¶ 10) and the addition of

a Second Blue Bid for certain qualified purchasers (*id.* ¶ 15). Subscriber Plaintiffs are also eligible for a monetary payment from a substantial settlement amount totaling \$2.67 billion, to be distributed according to a Court-approved plan of allocation. (*Id.* ¶¶ 22, 23, 28.)

The Settlement gives subscribers significant monetary relief as well as injunctive relief that will benefit Settlement Class members nationwide. This relief would be difficult to achieve in the litigation, and litigation would involve immense cost and delay. These factors strongly favor approval of the Settlement Agreement.

The Settlement also preserves important and procompetitive elements of the Blue System, which benefits Subscriber Plaintiffs as well as Defendants. The remaining structure of the Blue System enables it to continue to provide the broad nationwide coverage to subscribers throughout each State (*id.* ¶ 13). The Settlement also offers Defendants a comprehensive release from liability (*id.* ¶ 32). Most importantly, resolving the Subscriber Track will allow Blue Plans to focus on their core mission: providing the best, most affordable health care for their members. That mission has never been clearer than it is today, in the midst of a global health pandemic.

B. National Best Efforts

The National Best Efforts rule (“NBE”) was central to Subscriber Plaintiffs’ Claims and the Standard of Review Order. *See In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241, 1267 (N.D. Ala. 2018) (applying *per se* rule only to the alleged “aggregation of competitive restraints” including NBE). As part of the Settlement, BCBSA and Settling Individual Blue Plans will eliminate NBE. (*Id.* ¶ 10.)

C. Second Blue Bid

Under the Settlement, Qualified National Accounts—*i.e.*, Self-Funded Accounts that have at least 5,000 employees and meet certain other requirements—will have the right to make a

Second Blue Bid Request, except where the Qualified National Account already can request two bids under the current BCBSA rules. (*Id.* ¶ 15).

D. Acquisitions

The Settlement requires that any conditions imposed on the acquisition of a Blue Plan collectively by BCBSA and Settling Individual Blue Plans be reasonably necessary to prevent impairment of (1) the value of the Blue Marks, or (2) the competitiveness or efficiency of the Blue-Branded business or of the Blue Marks. (*Id.* at 17.)

E. Additional Provisions

The Settlement Agreement also addresses Self-Funded Account contracting with Non-Provider Vendors and/or Specialty Service Provider Vendors (*id.* ¶¶ 12(a)–(b)), multi-Service Area accounts with more than 250 total Members (*id.* ¶ 14(a)), Accounts with Independent Health Benefit Decision Locations (*id.* ¶ 14(b)), and Most Favored Nations Clauses (*id.* ¶ 18).

F. Monetary Relief

In addition to this significant injunctive relief, the Settlement Agreement will result in the creation of a \$2.67 billion Settlement Fund. (*Id.* ¶¶ 1(oooo), 22.) This Fund includes the \$100 million Notice and Administration Fund and the Fee and Expense Award(s) determined by the Court. (*Id.*)

G. Releases

In consideration of the substantial injunctive and monetary relief discussed above, Settlement Class Members agree to provide broad releases. (*Id.* ¶¶ 1(uuu)–(www), 32–33.)

II. The Go-Forward Blue System Maintains Lawful Business Conduct.

As described above, the structural changes achieved by this Settlement are significant, and the resulting Blue System is pro-competitive. Many vital elements of the Blue System will remain in place to continue serving Blue Plan members going forward. In cases involving ongoing

business practices, a class settlement can leave intact some challenged practices and include a release of future claims based on those same practices. *VKK Corp. v. Nat'l Football League*, 244 F.3d 114 (2d Cir. 2001); *see also Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1997) (approving settlement where the Court confirmed that the ongoing practices are not “clearly illegal” and noting that the ongoing practices confer significant procompetitive benefits).

Given the scope of the injunctive relief and changes made to the Blue System as part of this Settlement, both parties are now in agreement that the Court’s standard-of-review opinion does not apply to the go-forward Blue System. (Settlement Agreement ¶ 6.) Defendants respectfully maintain that the standard-of-review decision was wrong as a matter of law, but there is no dispute that it applied the per se rule only to the “aggregation” of NBE and service areas. *In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241, 1267 (N.D. Ala. 2018). As the Court has since confirmed, it “has not concluded that the ESAs, on their own, are a per se violation of the Sherman Act.” *Conway v. Blue Cross Blue Shield of Alabama*, No. 2:12-cv-02532 (N.D. Al.), Dkt. 604 at 10. They allow Blue Plans to engage in efficiency-enhancing cooperation so that they can offer nationwide capabilities while still providing unparalleled coverage within their service areas. *See In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d at 1276; (Dkt. 2565-49 and 50, Murphy Rpt. ¶ 104); *FTC v. Actavis*, 570 U.S. 136 (2013); *Procaps S.A. v. Patheon Inc.*, 845 F.3d 1072 (11th Cir. 2016).

Because the proposed Settlement would eliminate NBE, the “aggregation” of service areas and NBE would no longer exist, and the Court’s per se ruling, by its terms, would not apply to the go-forward Blue System. Instead, the parties both believe that the structure of the post-approval Blue System is not per se illegal and thus poses no obstacle to approval of the Settlement.

CONCLUSION

For these reasons, Defendants respectfully state that the Settlement meets the requirements under Rule 23 of fairness, reasonableness, and adequacy for preliminary approval.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2020, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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